आयुक्त (अपील्स) का कार्यालय, केंद्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क:
OFFICE OF THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. [illegible]/BVR/2017	मूल आदेश सं / O.I.O. No. [illegible]/2016-17	दिनांक / Date 20-03-2017

ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-069-2018-19

आदेश का दिनांक / Date of Order:	26.04.2018	जारी करने की तारीख / Date of issue:	08.05.2018

Passed by Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham)

बोर्ड द्वारा जारी अधिसूचना संख्या 26/2017-केंद्रीय उत्पाद शुल्क (एन.टी.) दिनांक 17.10.2017 के साथ पठित बोर्ड आदेश संख्या 05/2017-एसटी दिनांक 16.11.2017 के अनुसरण में, श्री पी. ए. वसावे, आयुक्त, केंद्रीय वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, कच्छ (गांधीधाम), को केंद्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35 एवं वित्त अधिनियम 1994 की धारा 85 के अंतर्गत दायर अपीलों के संबंध में आदेश पारित करने के लिए अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham), has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित:
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham / Bhavnagar

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-

1. M/s Kinder Engineers, Tacon Complex 00, Wadi Plot, Porbandar,

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केंद्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बंधित सभी मामले सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।।
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन, असरवा अहमदाबाद- ३८००१६ को की जानी चाहिए ।
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(i) [illegible] 1,000/- [illegible] 5,000/- [illegible] 10,000/- [illegible]

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/-, Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(ii) [illegible] 1994 [illegible] 86(1) [illegible] 1994 [illegible] 9(1) [illegible] S.T. 5 [illegible] 1,000/- [illegible] 5,000/- [illegible] 10,000/- [illegible] 500/- [illegible]

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed Bank Draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(iii) [illegible] 1994 [illegible] 86 [illegible] (2) [illegible] (2A) [illegible] 1994 [illegible] 9(2) [illegible] 9(2A) [illegible]

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(iv) [illegible] 1944 [illegible] 35F [illegible] 1994 [illegible] 83 [illegible] (10%) [illegible] 10 [illegible]

[illegible]

(i) [illegible] 11 [illegible]

(ii) [illegible]

(iii) [illegible] 6 [illegible]

[illegible] (No. 2) [illegible] 2014 [illegible]

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include:

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :

Revision application to Government of India:

[illegible]

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(i) [illegible]

In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) [illegible]

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) [illegible]

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) [illegible]

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) [illegible]

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) [illegible]

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) [illegible]

In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) [illegible]

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) [illegible]

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) [illegible]

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER -IN –APPEAL::

1.0. <u>BRIEF FACTS AND GROUNDS OF APPEAL:</u>

1.1. The subject appeal has been preferred by M/s. Emar Engineers, Tacon Complex, 1.09, Wadi Plot, Porbandar -360575 (hereinafter referred to as "the appellant") against the Order-In-Original No. 102/AC/STAX/DIV/2016-17, dtd. 20.03.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner (AC), Service Tax Division, Bhavnagar (hereinafter referred to as "the Adjudicating authority"). The Appellant are engaged in providing taxable services of categories "Commercial & Industrial Construction", "Works Contract service" etc. and they are registered with service tax vide Registration No. AABFE0339DS001.

1.2. Intelligence gathered revealed that M/s. Tacon Infrastructure Pvt. Ltd. (hereinafter referred to as "TIPL") and its sister concerns including the Appellant were indulging into the evasion of service tax by non-payment/short payment of service tax in respect of taxable services provided/received by them. Based on the intelligence, search of the office premises of the Appellant was carried out on 03.12.2014.

1.3. In the course of investigation, statement of Shri Mahendrakumar Gokaldas Kotecha, Partner of the Appellant was recorded on 09.06.2015 wherein he inter alia stated that they had obtained service tax registration and filed service tax returns for the period ended on March, 2011, September, 2011 and March, 2012; that in 2010-11, the Appellant had provided construction services to M/s. Chirag Construction (Hereinafter referred to as 'M/s. CC') as their sub contractor in relation to Dry Dock and Offshore Projects at Pipavav Shipyard Ltd. (Hereinafter referred to as 'M/s. PSL'); that all those service tax returns filed by them were pertaining to the services they had provided to M/s. CC; that they had discharged service tax liability on actual receipt basis and service tax on the amount not received had not been paid as per the provisions of service tax laws prevailing up to 01.07.2011; that the Appellant had provided services to M/s. TIPL as their sub-contractor for execution of construction of road, canals etc. carried out by M/s. TIPL; that the services of excavation of soil/stone etc. and petty work provided by their firm as sub-contractor to M/s. TIPL were exempted from service tax, being provided in connection with various road/canal projects. However, as regards to the services of transportation of materials provided by them to M/s. TIPL, service tax was payable by M/s. TIPL under Reverse Charge Mechanism.

1.4. After investigation, it appeared that during 2010-11, the Appellant had provided Commercial and Industrial Construction services in terms of Section 65(105)(zzq) of the Finance Act, 1994 ("The Act") to M/s. CC and also provided services of site formation & clearance, excavation and earthmoving & demolition as per Section 65(105)(zzza) of the Act to M/s. TIPL as their sub contractor for two Canal projects. It also appeared that as per the ledger of M/s. CC maintained by the Appellant, they had received Rs.55,88,053/- during 2010-11 to 2014-15 from M/s. CC for providing the services of Commercial and Industrial Construction services, whereas in the ST-3 returns

filed by the Appellant, they mis-declared their income for the same as Rs.46,11,781/-, with a view to evade payment of service tax and short paid service tax to the tune of Rs.2,54,852/-; that the services of site formation & clearance, excavation and earthmoving & demolition provided in the course of construction of canal were not included in the scope of the erstwhile Notification No. 17/2005-S.T. dtd 07.06.2005, hence liable to service tax and therefore the Appellant had not paid service tax of Rs.4,81,638/- for such services provided by the Appellant to M/s. TIPL during 2010-11; thus, there was total short-payment/non-payment of service tax of Rs.7,36,490/- by the Appellant during 2010-11 to 2013-14, which was in contravention of the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 ("The Rules"); that the Appellant had filed only three service tax returns and that too with the wrong details and thereby they had committed an offence in terms of Section 70 of the Act; that this was found as appropriate case for invoking the provisions of the Proviso to Section 73(1) of the Act for demanding the short paid/non paid service tax with interest at the rate applicable under Section 75 of the Act. In this regard, therefore, a Show Cause Notice dtd 12.04.2015 was issued to the Appellant proposing therein the demand and recovery of service tax of Rs.7,36,490/- under Proviso to section 73(1) of the Act along with interest under Section 75 of the Act; penalty under Section 76 of the Act and Section 77(2) of the Act.

1.5 In Reply to the SCN dtd 12.04.2015, the Appellant vide their letter dtd 27.05.2015 submitted as follow:

(a) As regards the construction services provided by them to M/s. CC, it was submitted that under Dry Dock project various work was to be carried out like manpower arrangement, machinery hiring, worker's management and some materials also to be provided, hence the service tax for the said work was charged @10% plus cess on the service value; that under Offshore project the work of piling for platform etc. was to executed along with material and no free goods having been given by PSL for which they raised bills after opting the Composition Scheme of Works Contract and charged service tax @4% plus cess; that they raised six RA Bills for Dry Dock project for Rs.1,59,10,682/- and six RA bills for the offshore project for the amount of Rs.50,57,804/-, against this, they received consideration of Rs.23,66,200/- against the Offshore project and Rs.28,73,419/- for the Dry Dock project, thus, they had service tax liability of Rs.3,18,269/- after availing the threshold exemption limit of Rs.10,00,000/- and thereby the differential service tax remained to be paid works out to Rs.1,00,551/-.

(b) As regards the services provided by them to M/s. TIPL, out of two project works of canal construction, the same were classifiable under Section 66(9a) of the Act, which services exempted from the service tax.

1.6. The appellants were also granted personal hearing and thereafter the Order came to be passed by the adjudicating authority. The adjudicating authority found that the Appellant had raised the invoices on M/s. CC for providing services in relation to Dry Dock Project charging service tax @10% of the billed amount, whereas for the Offshore Project

in the invoices they have charged service tax @12% of the billed amount. For this reason the Appellant intended to distinguish the services provided by them. In this respect it was view of the adjudicating authority that while recording the statement dtd.08.08.2016, the Appellant has provided only one contract dtd. 14.09.2010 in respect of both the Project works. In terms of said contract, most of the materials were to be supplied by M/s. CC to the Appellant and the consideration to be provided is towards the service portion only, which did not include the cost of the materials. It was further noted by the adjudicating authority that the rates quoted in all the invoices raised by the Appellant in respect of both the Projects were exactly as per the rates prescribed under the work order dtd. 14.09.2010. When the services provided by the Appellant to M/s. CC is as per the work order dtd.14.09.2010, the same is appropriately to be considered as "Commercial and Industrial Construction service" classifiable under the erstwhile Section 65(105) (zzq) of the Act liable to the full rate of service tax @12% of the service value received as consideration by the Appellant. As per the ledger of M/s. CC, which was produced during statement dtd.08.09.2016 the Appellant has received Rs.55,83,059/- from M/s. CC for both the Projects whereas it has been argued by the Appellant that they had received only Rs.51,85,718/-. However, it is apparent on examination of their accounts that the Appellant did not consider the TDS amount deducted by M/s. CC. Thus, the adjudicating authority has found that the service tax of Rs.4,77,725/- computed from the Appellant in respect of the services provided by them to M/s. CC has been correctly calculated and after allowing adjustment of service tax of Rs.2,17,173/- already paid by the Appellant, there is a short payment of service tax of Rs.2,54,552/-.

17. As regards the services provided by the Appellant to M/s. TIPL it was found by the adjudicating authority that M/s. TIPL were awarded two projects viz. Construction of Pachhar Kolkhada spreading channel and Bhadar-II Project by the State Government. M/s. TIPL had sub-contracted its related excavation work to the Appellant. The services provided by the Appellant in this regard were excavation in Soft/Hard/Murum all types of strata approximately are taxable services of 'Site Formation and Clearance, Excavation and Earth moving and Demolition and such other similar activities' which is classifiable under erstwhile Section 65(105) (zzzza) of the Act. The erstwhile Notification No. 17/2005 ST, dtd.07.06.2005 exempted service tax on such services provided to any other person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports, but here such services have been provided in the course of construction of channel and canal which are not exempted under the said Notification. Further to this, as clarified by the CBEC vide Circular No. 158/12/2011-ST, dtd.06.05.2011 and No. 147/15/2011-ST, dtd.21.10.2011, the sub-contractor is essentially a provider of taxable service and the services provided by them are in the nature of input services and the sub-contractors are providing works contract service to the main contractor for completion of the main contract, which is exempted works contract service, then service tax is not leviable on the works contract services provided by such sub contractor. In the instant case the main contractor is M/s. TIPL, who has provided

the exempted works contract service but the services of mere excavation of soil/HARD/all types of strata provide by the Appellant were not being in the nature of the exempted Works Contract service but they are the taxable service of 'Site formation and clearance, excavation and earthmoving and demolition', which is assessable under erstwhile Section 65(105)(zzza) of the Act, liable to service tax under Section 66 of the Act. Accordingly, I was vide that the service tax of Rs.4,61,678/- demanded in respect of such service is correctly payable by the Appellant.

1.8 The adjudicating authority had thereby confirmed the demand of Rs.7,38,643/- under proviso to Section 73(1) of the Act with interest on the same in terms of Section 75 of the Act and also imposed penalty of Rs.7,38,643/- on the Appellant under Section 78(1) of the Act, thereby reducing the option of reduced penalty. Penalty of Rs.10,000/- was also imposed on the Appellant under Section 77(2) of the Act. Accordingly passed the OIO No. 102/AC/STAX/DIV-II/2017, dtd.23.03.2017.

1.9. Being aggrieved by the OIO dtd.20.03.2017, the Appellant has filed the present appeal, mainly containing the following grounds.

(i) The adjudicating authority had not at all dealt with the pleas made in written reply to the SCN, while passing the impugned order and thus, it is a non speaking order and non reasoned order.

(ii) The findings made by the adjudicating authority were absolutely vague and without considering the reply to the SCN filed by them, passed the impugned order in mechanical manner.

(iii) M/s. TIPL were awarded two contracts by the Government of Gujarat. Under the MOU dtd.30.11.2010 and 30.09.2011, M/s. TIPL awarded the Appellant contract of excavation of soil/SAND etc. and accordingly they rendered the services and raised three invoices. As per the terms of 'Site formation and clearance, Excavation and Earthmoving and Demolition' as defined vide Section 65(97a) of the Act, such service were excluding the services provided in relation to irrigation and watershed development. So, the services provided by the Appellant may not be considered as services provided under Section 65(105)(zzza) of the Act, hence exempted from the levy of service tax. The adjudicating authority made reference to the CBEC Circulars, but deliberately avoided to discuss the nature of service being provided by them, which is by virtue of definition itself an exempted service. Thus, the CBEC Circulars were not at all relevant to the instant case of the Appellant.

(iv) The Appellant had also relied upon the following case law:

(a) ITD Cementation India Ltd. vs. CST, Mumbai [2014(36) STR 897 (Tri. Mumbai)]

(b) Commissioner vs. ITD Cementation India Ltd. [2015(38) STR 1424(Guj)]

(v) It was found by the adjudicating authority that the prices determined and mentioned in the Exhibit-I appended to the Work Order dtd.14.09.2010 were related to the service portion of the service provided by the Appellant to M/s. CC for both the projects and the same did not include the cost of the materials, which findings are based on assumption and presumption. It was argued by the Appellant that both the projects were separate projects and governed by different terms and conditions. Since being old matter, they could not find out the work order entered for the other two projects, hence the Appellant requested to make further submission for the same at the time of hearing. The Appellant, however, agreed with the findings of the adjudicating authority that the TDS deducted by M/s. CC were not counted as payment received by the Appellant and agreed to provide calculation at the time of making additional submissions during the personal hearing.

(vi) The short payment as agreed by the Appellant was due to lack of knowledge and technical interpretation of the TDS deducted by the service recipient and there was no malafide intention to evade the payment of service tax or to contravene any provisions of the Act. Otherwise, there was no short payment of service tax on the services provided by the Appellant to M/s. CC. Since the services provided by the Appellant to M/s. TIPL were not a taxable service at all, they did not consider the same to be mentioned in ST-3 returns and there was no suppression on their part which may warrant levy of any penalty under Section 78 and 77(2) of the Act. For this, the Appellant sought immunity from the payment of penalty.

(vii) The OIO dtd.28.03.2017 was received by the Appellant on 29.03.2017 and the appeal has been filed on 19.05.2017. While filing the appeal, the Appellant represented that they had made pre-deposit of Rs.55,200/- vide GAR-7 Challan CIN 0280481 7052017 03113 dtd.17.05.2017 under Accounting Code 00440305.

1.10. The Central Board of Excise and Customs had vide Notification No. 26/2017-CEx (NT), dtd.17.10.2017 read with Board's Order No. 05/2017-ST, dtd. 16.11.2017 has appointed the undersigned as appellate authority under Section 85 of the Central Excise Act, 1944 for the purpose of passing orders in the present appeal.

1.11. Accordingly, the Appellant were granted opportunity of hearing on 31.01.2018, which was attended by Shri Punit Prajapati, Chartered Accountant and Authorised representative of the Appellant. During hearing, he reiterated the grounds in appeal. The definition provided in Section 65 (105)(97a) had specifically excluded the services in relation to agriculture, irrigation, watershed development and drilling, repairing, renovating or restoring of water sources of water bodies. However, their pleas were not at all considered during adjudication. That the demand of Rs.2,54,652/- is for two different contracts. Hence, he fairly agreed that the amount of Rs.1,00,551/- was payable by them as calculated in reply to the SCN and grounds of appeal. With this submission, he requested to drop the demand of service tax, interest and penalties. He also represented that, the maximum penalty which can be imposed under Section 78 of

the Act is 30%, as the tax has been demanded based on ledgers and reported in books of accounts. He also requested time to make one more additional submission.

1.12 Vide letter dtd.07.02.2018, the Appellant filed their further written submission, in which they provided a copy of MOU dtd.04.09.2010 for the Offshore Project implying that the said contract was inclusive of the material and independent of the work contract pertaining to Dry Dock Project and thereby correctly assessed to the tax @4.12% instead of taxed @10.3% in the SCN and the OIO. They also provided revised work sheet calculating the amount payable by them as Rs 1,31,[illegible]/- and agreed to make payment of service tax, interest and penalty if any, after adjustment from the pre-deposited sum.

1.13 Copy of the appeal memo was provided to the Assistant Commissioner, Service Tax Division, Bhavnagar vide letter dtd.26.05.2017 and they were also informed about the hearing schedule, but nothing has been received from them.

2.0. FINDINGS:

2.1. I have carefully gone through the appeal papers placed before me and the submissions made by the Appellant during the proceedings, which took place before me. I find that the Appellant has made pre-deposit of Rs 55,250/- vide GAR-7 Challan CIN 01604911705201730112 dtd.17.05.2017, which is more than 7.5% of the amount of service tax of Rs 7,36,440/- confirmed in the Impugned Order. Thus, I find that there is substantial compliance to Section 35F of the Central Excise Act, 1944 read with Section 83 of the Act. Accordingly, I proceed to decide this appeal.

2.2 The Appellant has produced before me in their additional submission dtd.07.02.2018 a copy of the MOU dtd.04.09.2010, which they had not produced before the adjudicating authority and also not provided while filing the appeal. In terms of Rule 5 of the Central Excise (Appeal) Rules, 2001, I am opposed to consider the disentitlement of the Appellant to produce such additional evidence during the appeal proceedings, particularly when they did not produce the same before the adjudicating authority. However, in the context of exceptional circumstances and more particularly referring to circumstances (c), providing that where the Appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal, the same may be allowed for production, when I find that the Appellant had already mentioned in the grounds of appeal that being very old matter they could not trace out the copy of the work order entered for the Offshore Project and requested that the detailed grounds of appeal for this point would be made afterwards or at the time of personal hearing of the appeal. Hence without prejudice to the veracity of the said copy of the MOU dtd.04.09.2010, I allow the same to be admitted for consideration during the appeal process in terms of Rule 5(2) of the Central Excise (Appeals) Rules, 2001.

2.3 Prima facie, I find that the points for determination in the present appeal in terms of Section 35A (4) of the Central Excise Act, 1944 read with Section 83 of the Act, are the following:

(a) Whether the services provided by Appellant to M/s. CC in respect of sub-contracting of work relating to the Offshore project of M/s. PSL are required to be assessed to service tax @1.12% of the billed amount, extending them the benefits of concessional assessment in terms of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 or full rate of service tax @12.36%?

(b) Whether the Appellant were required to be extended the benefit of mini-tax assessment in respect of services they had provided to M/s. CC?

(c) Whether the Appellant were entitled for exemption from service tax in respect of services they had provided to M/s. TIPL in terms of exclusion clause provided in Section 35(87a) of the Act?

(d) Whether the case law of HD Construction India Ltd. relied upon by the Appellant is applicable in the present case of the Appellant?

(e) What should be the amount of service tax demand to be confirmed? Under which provisions of the Act such demand may be confirmed? Is there any case for levy of interest under Section 75 of the Act on such confirmed demand? Is there any case for imposing penalty on the Appellant under Section 78 of the Act and what should be the quantum of such penalty? Is there any case for imposing penalty on the Appellant under Section 77(2) of the Act and what should be quantum of such penalty?

(f) What should be the order which is just and proper, in the context of the grounds of appeal, submission made by the Appellant during hearing as well as by way of additional submission and merits of the case before me?

2.4. As regards the point (a), I find it an undisputed fact that at the relevant time the Appellant were assigned two work contracts by M/s. CC, one is for Dry Dock Project and another one is for Offshore Project. I find that during the statement dtd.08.05.2015, the Appellant has provided only a copy of the Contract/Work order dtd.14.Jul.2011 for the work assigned on sub contract basis to them by M/s. CC, but there is no specific question placed during the said statement and even at subsequent stage of the inquiry how the tax treatment was provided by the Appellant for two different work assignments and whether there were different contracts particularly when the invoices and RA bills presented at the material time were separately indicating the categories of service rendered and the tax rates and the returns of service tax filed by the Appellant during the relevant time were also indicating assessment for both the services. The SCN issued at the material time had proposed to assess both the contracts works under the same classification and

declaring the benefits of Works Contract service for the Offshore Project on the basis of the averments made vide Para 5.1(g) of the SCN, which resulting in the Work Order dtd.14.09.2010. It was alleged that the rates mentioned in the Exhibit-I attached to the Work Order dtd.14.09.2010 were only for providing services and the description of item/invoices raised by the Appellant on M/s. CG were false and as per those mentioned in the Exhibit-I attached to the Work Order dtd.14.09.2010. I find substantial force in the said averments when I examine the same. The fact is also that the Appellant had not provided copy of the different contract at the time of adjudication and initial stage of the appeal, but only in the additional submission cd.07.02.2018 they have provided before me a copy of MOU dtd.24.09.2010. I do not find the said copy of MOU cd.04.01.2018 as reliable one, in as much as the same does not define the scope of work and BOQ, as it is evident in the Work Order dtd.14.09.2010. Moreover, it is evident from AA of the statement cd.09.06.2015 that "In the year 2011-2012, our firm had provided construction services to M/s. Chirag Construction as their sub-contractor in relation to the Dry Dock and Offshore Projects at Pipavav Shipyard Ltd. Originally these projects were awarded to M/s. Larsen Infrastructure Ltd., which were given to M/s. Mac Inv Power Pvt Ltd. under sub-contracts. M/s. MacInv Power sub-contracted the same to M/s. Chirag Construction, which in turn sub-contracted a part of the project work to our firm. I produce a copy of the Contract/Work Order dated 14-9-2010 entered with M/s. Chirag Construction, bearing my dated signature ..." thus I also tend to believe that there was no case of any other MOU or work contract as being represented by the Appellant as of now. My belief is getting stronger when I find that the so called copy of MOU cnd. 04.01.2018 presented by the Appellant is indicating "M/s. Chirag Construction Co." as a different person of "M/s. Chirag Construction" in whose favour all the RA Bills and invoices have been raised. Also I find that in the statement, the Appellant had not intended to distinguish both the work contracts and as appears both the works were assigned together and further re-assigned in favour of the Appellant together. It has been rightly explained in the SCN that the quantities and rates mentioned in the Exhibit were exclusive of taxes, duties, levies and cess etc. and the Appellant at the end of each month were required to return said materials/items/ goods out of the materials provided by M/s. CG from time to time. Even if it is believed that the services rendered by the Appellant for Dry Dock was not under Work Contract and the given Work Order dtd. 14.09.2010 was governing the same, then the Appellant may have to provide the Bills pertaining to Sr. No. 1 to Sr. No. 10 of the MOU Annexure to the Work Order, in relation to the services pertaining to the Dry Dock Project. None of the RA Bills or Invoices are indicating relevance of different MOU or Work Order, as being submitted now by the Appellant. Hence, I am surprised to conclude that there is no such distinguishing factor. I am, therefore, inclined to reject the averments made from the Appellant side in this respect and uphold what has been observed by the adjudicating authority in his order in this respect. With these reasons, I decide the point (a) with the negative.

2.5. Now dealing with point (b), it is plea of the Appellant that the notice demanding service tax has been issued on the basis of the perusal of total receipt as there from M/s. CC and that the said receipt includes the tax amount, hence they are entitled for cum-tax assessment while considering their tax liability more particularly in the context of the fact that during the relevant time the service tax liability was to be considered on receipt basis till 30.06.2012. Although the Appellant had mentioned in the invoices the amount of service tax and the service value separately, whatever they had received from the service recipient is not in distinct manner, but it was received in combined manner. Hence, I do not find any reason for denying the same and contradict by the relevant legal provisions to accept the same, when the tax liability is to be considered legally in terms of Section 67 of the Act on receipt basis during the relevant period, even though I noticed an admission from the Appellant that the outstanding service tax liability of Rs.15,09,570/- has been reflected as service tax payable in the Audited financial report of the Appellant for FY 2010-11, being the amount of service tax charged but not received from the service recipient against the due payment of Rs.1,52,73,900/-. With these reasons, I decide the point (b) with reinforcement.

2.6. Now coming to point (c), that is, the notice has proposed the demand of service tax from the Appellant in respect of services of excavation of soil/SAND for two canal projects provided by them to M/s TIPL as a sub contractor in terms of MOU dtd.31.11.2010 and 30.07.2011 in the category of "Site formation and clearance, excavation and earthmoving and demolition" as defined under erstwhile Section 65(105)(zzzh) of the Act, which is classifiable as "taxable service" under erstwhile Section 65(105)(zzzz) of the Act. It is an apparent fact that the Appellant has not charged any service tax in their invoices dtd. 31.12.2010, 28.02.2011 and 31.05.2011 in respect of these services which they had provided during 2010-11, considering these services of the exempted category. In the statement dtd.30.06.2015 also, there is a confident answer from the Appellant that they were not required to charge service tax on the service of such category, which had been provided by them towards canal projects of the Government. In the statement dtd.08.09.2015, the Appellants were not agreed on this aspect. But in para 6 (iii) (v) and (x) of the Notice, the Appellants has been asked to clarify on this aspect alleging that erstwhile Notification No. 17/2005-ST, dtd.07.06.2005 did not extend exemption for the services, which were provided in the course of construction of canal. Further, referring to the clarification provided by the CBEC vide Circulars No. 158/7/2011-ST, dtd.06.05.2011 and No. 147/13/2011-ST, dtd.27.10.2011 clarified that just because the main contractor is providing works contract service of exempted category it would not automatically lead to the classification of service being provided by the sub-contractor to main contractor as Works contract service and the classification would have to be independently done as per the rules and taxability would get decided accordingly. In this context, it was alleged in the NOC that the service being provided by the Appellant were not of the category of works contract service in nature and appears to be the taxable service of 'Site formation and clearance, excavation and earthmoving and demolition' and such other similar

activities" classifiable under Section 65(105)(zzza) of the Act, hence the said services were liable to be taxed under erstwhile Section 66 of the Act. In this respect, although mentioned by the Appellant in their returns of service tax about such service as Works contract service and sought exemption, the clarification has been provided by the Appellant in their reply to the Notice before the adjudicating authority and also in the grounds of appeal placed before me in the present appeal that Section 65(105)(zzza) of the Act allows the department to consider the services provided or to be provided to any person, by any person in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities as "taxable service" but while defining the term of 'site formation and clearance, excavation and earthmoving and demolition services' vide Section 65(97a) of the Act, the provision has been made to exclude the services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies. It is not disputed that the services were provided by the Appellant to M/s. TIPL as their sub-contractor for the main contract for Construction of Panchar-Kolkhasa Spreading Channel and for Bhadar-II irrigation project for construction of bund etc for the main canal and its branches. In this context, the services provided by them were not falling within the category of 'taxable service' under the classification of service provided vide Section 65(105)(zzza) of the Act, as has been alleged in the notice and has to be considered as exempted service. So far the circulars of the CBEC are concerned, the same are not relevant when the services were not of 'taxable category' within the meaning of Section 65(105)(zzza) of the Act. Apparently Notification No. 17/2005-ST, dtd.07.06.2005 did not provide exemption to the projects related to canal etc., as there was no need of such exemption at all, in view of the fact that said services in relation to canal were not covered under the taxable category at all. It has been correctly spelled that their pleas in this regard remained unheard before the adjudicating authority and due to non-consideration on this aspect the demand which has been confirmed required to be set aside. I endorse my considered view on this aspect by finding significant force in the averments made by the Appellant in this regard. The issue getting closed when the term defined vide Section 65(97a) of the Act explicitly disallow coverage to the services provided in relation to irrigation and watershed projects. There is no reason to differ with the pleas made by the Appellant in this respect. Finding full justification in favour of the Appellant's submission on this aspect, I am to decide the point (c) also with fortification.

2.7. On point (d), I find the facts of the said case are almost similar to the present case of the Appellant. It was viewed by the CESTAT, WZB, Mumbai in that case that the Appellant of the said case were required to construct diaphragm wall, anchor slab and retention wall with special fill for guide bund in different sectors alongside the Western and Eastern Bank of Sabarmati River in Ahmedabad. In the instant case before me the Appellant are not required to attend such civil work, but only required to provide the services within the limited scope of "Excavation in soil/SR/HR" and "Excavation in all type of strata" but apparently the work order specifically indicated that those services were to

be provided by the Appellant as sub contract work of Pasler-Kalkitla Channel Bhadar-II WR Project. In this context, looking to the view adopted by CESTAT in Para 12 of the Order dtd.22.07.2014 that " in our view, the water body is already existing, what is being done is to renovate the banks of the river. In view of the position, we are of the view, though the activity undertaken by the appellants are covered by the main definition but gets excluded due to the exclusion clause. In view of this analysis, the activity undertaken by the appellant will not get covered by the 'Site formation and clearance, excavation and earthmoving and demolition service' and accordingly no service tax would be chargeable", which is squarely applicable in the present case also. I find that the view expressed by the CESTAT has been strengthened by rejection of appeal filed by the department against the said CESTAT Order dtd.22.07.2014 hence the Supreme Court was dismissed on merits. In this context, I need to follow the judicial discipline which requires me to consider the said services provided by the Appellant out of the net of the "taxable service" and accordingly, my decision in respect of point (d) is in consideration of what has been submitted by the Appellant in this respect.

8.8. As regards to point (e), I find it is undisputed fact on record that the Appellant has short paid the service tax in respect of services they had provided to M/s. CC. As per the SCN and OIO, the quantum of short paid service tax is found to be of Rs.2,57,852/- whereas the Appellant has sought the short paid service tax is limited to Rs.2,51,778/- only. In this respect, they have sought reduction on account of works contract scheme and sub-contractor's. After elaborate discussion, it is apparent that the Appellant are not entitled for assessment under Works contract Scheme, although they are entitled for sub tax formula. Therefore, the quantum of short paid service tax on the taxable amount may be calculated as under:

Total amount received with TDS	Rs.55,80,356/
Less: Threshold exemption	Rs.10,00,000/-
Total taxable amount of service	Rs.45,80,356/
(With service tax)	
Total received amount of service	Rs.41,59,815/
Service tax payable @12.3%	Rs.4,28,449/-
Service tax paid	Rs.2,17,671/-
Service tax short paid	Rs.2,10,778/

I, therefore, modify the amount of confirmed demand of short paid service tax under Section 73(1) of the Act from Rs.2,57,852/- to Rs.2,10,778/- (Rupees Two lakh Ten Thousand Seven Hundred Twenty Three only) towards the services of Commercial and Industrial Construction service provided to M/s. CC classifiable under Section 65(105)(zzq) of the Act. The demand has been raised by way of invoking the extended

period of 5 years in light of the aforesaid ingredient of suppression and mis-statement relied on the part of the Appellant. It is argument of the Appellant that they failed to consider the amount of TDS deduction, which lead to the short payment of service tax is not correct. Inasmuch as the Appellant has thought fully aware about the nature of contractual work superseded the same with a view to reduce their tax liability and deliberately made false claim under Works Contract service for the Offshore Project, which is also covered by the Work Order dtd 14.09.2010. The Appellant had also made wrong declaration about receipt from the service recipient. Thus, the aforesaid demand of service tax of Rs.2,10,723/- has to be confirmed under Section 73(1) of the Act and the remaining amount of demand of service tax of Rs.5,25,805/- has to be set aside allowing in favour of the Appellant the benefits of cum-tax assessment for Rs.41,128/- and also allowing the benefits of exclusion clause provided in Section 67(ii)(a) of the Act for demand of service tax of Rs.7,61,525/-. Consequently, the Appellants are liable to pay interest at applicable rate on the said amount of service tax at Rs.2,10,723/- under Section 75 of the Act. The Appellant has also contended that maximum amount of penalty which can be imposed in terms of Section 78 of the Act is @30%, whereas on them penalty @100% has been incorrectly imposed. However, I do not find such plea backed by any legal provision, hence I reject the same. In terms of Section 78 of the Act, where any amount of service tax has not paid by reason of wilful mis-statement or suppression of facts or in contravention of any of the provisions of the Chapter V of the Act or of the rules made thereunder with intent to evade payment of service tax, the penalty is also payable by such person, which shall be equal to hundred percent of the amount of such service tax. There is no exception of 30% penalty. In that case, I modify the amount of penalty under Section 78(2) of the Act from Rs.7,36,180/- to Rs.2,10,723/- (Rupees Two Lakhs Ten Thousand Seven Hundred Twenty three only). I affirm the findings of the adjudicating authority that the Appellant had suppressed the value of taxable services that comes in the ST-3 returns filed by them from time to time, which resulted into short payment of service tax with intention to evade the payment of service tax. The said facts of short payment of service tax came to the knowledge of the department only after initiation of the inquiry against the Appellant. I also find that this is an appropriate case for imposing penalty under Section 77 of the Act for failure to correctly assess, pay service tax due thereon and for failure to file returns of service tax with correct details about the services rendered in terms of Section 70 of the Act read with Rule 7 of the Rules. However, in the context of the peculiar circumstances of the case, I reduce the said amount of penalty under Section 77 of the Act from Rs.10,000/- to Rs.5,000/- (Rupees Five Thousand Only). Accordingly, I decide the point (e) with such affirmation of part of the demand of service tax, interest and penalties and at the same time setting aside remaining part of the demand of service tax, interest and penalties.

9.0 At the conclusion of all the above and while rendering the decision at point (g), I pass the order for modification in the amount of confirmation of demand of service tax of from Rs.7,36,180/- to Rs.2,10,723/- (Rupees Two Lakhs Ten Thousand Seven

Hundred Twenty three only) under Section 73(1) of the Act, with interest leviable at applicable rate thereon under Section 75 of the Act. I order for quashing and setting aside the demand of service tax of Rs.6,95,753/- confirmed under impugned order under Section 73(1) of the Act with quashing and setting aside the consequent demand of interest, which was confirmed on said amount of service tax under Section 75 of the Act. I order for modification in the amount of penalty from Rs 7,20,480/- under Section 78(1) of the Act to Rs.2,13,729/- (Rupees Two Lakhs Ten Thousand Seven Hundred Twenty Nine only) under Section 78(2) of the Act. I set aside the amount of penalty of Rs.6,95,753/- imposed on the Appellant under Section 78(1) of the Act. As regards the imposition of penalty of Rs.10,000/- on the Appellant under Section 77(2) of the Act, I modify the said penalty amount from Rs.10,000/- to Rs.5,000/- (Rupees Five Thousand Only) under Section 77(2) of the Act and set aside the balance amount of penalty of Rs.5,000/- imposed on the Appellant under Section 77(2) of the Act.

2.13. In above terms, I dispose the appeal by way of allowing the appeal filed by the Appellant to the above extent by way of partial modification in the confirmed amount of short paid service tax, interest thereon and penalties.

(P. A. Vasava)
Commissioner (Appeals)
Commissioner
CGST & Central Excise,
Kutch (Gandhidham)

F. No. V2/172/BV/2017 Date: 23.04.2018

By R.P.A.D.

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Copy to:

1. The Chief Commissioner, CGST & C. Ex., Ahmedabad Zone, Ahmedabad.
2. The Commissioner, CGST & C. Ex., Bhavnagar.
3. The Additional Commissioner, CGST & C. Ex (System), Bhavnagar.
4. Guard file.